

## TWENTY-FIRST ORDINARY SESSION

### ***In re* HERMANN**

#### **Judgment No. 133**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the United Nations Educational, Scientific and Cultural Organization (UNESCO) drawn up by Mr. Arne Erling Hermann on 13 February 1968, the reply of the Organization dated 23 April 1968, the rejoinder of complainant dated 4 June 1968, and the Organization's reply thereto dated 28 August 1968;

Considering Article II, paragraph 5 of the Statute of the Tribunal, Articles 4.1 to 4.4 and 9.1 of the UNESCO Staff Regulations and UNESCO Staff Rules 104.1, 104.2, 104.15 and 109.5;

Having heard in public session on 10 March 1969 M. Pilleboue-Depierres, Counsel for complainant, and Mr. Georges Perrenoud, agent of UNESCO;

Considering that the material facts of the case are as follows:

A. On 3 June 1952 complainant was appointed by the Organization for a period of one year. His contract was twice renewed, and was subsequently replaced by an indeterminate appointment as from 28 March 1956. Complainant was promoted from grade P.2 to grade P.3 with effect from 1 July 1964.

B. The Division of Applied Social Sciences to which complainant belonged formed part of the Department of Social Sciences until the beginning of 1964, and was then attached to the Department of the Application of Sciences to Development. On 1 January 1966 the Division was again transferred to the Department of Social Sciences. In 1965 and 1966 it comprised four posts: one P.5, two P.4, and the P.3 post occupied by complainant. As a result of resolutions adopted in October and November 1966 by the 14th Session of the General Conference of the Organization, the Director-General reorganised the Division of Applied Social Sciences, to which six posts were assigned for 1967 and 1968, namely two P.5, two P.4 and one P.1/P.2. As a result, the P.3 post held by complainant was abolished on 31 December 1966.

C. Complainant was first informed orally of this decision, and it was confirmed on 20 December 1965 by the Director of the Personnel Office, who informed him that if it proved impossible to assign him to another post his contract would be terminated. With a view to finding complainant another post the Organization took various steps, which proved unsuccessful. On 2 December 1966 several chiefs of service were approached without result. On 23 January 1967 complainant was offered a P.1/P.2 post in the Sudan, which he refused. On 17 April 1967, in compliance with a recommendation of the Senior Personnel Advisory Board, a communication was sent to all Directors of Departments and Bureaux, again without result. The Director-General then terminated complainant's appointment, in accordance with Article 9.1 of the Staff Regulations, as from 1 July 1967, as notified to complainant in a letter from the Acting Chief of the Personnel Office on 30 June 1967. Complainant, who had meanwhile been employed on various temporary assignments and paid the salary for his grade, received a sum of 3,271.38 United States dollars on account of salary and indemnities in lieu of the three months' notice laid down under Staff Rule 109.6. He was also granted an indemnity on separation (nine months' salary, amounting to 8,178.75 United States dollars); a repatriation grant (28 weeks' salary, amounting to 5,871.92 United States dollars), and the cash equivalent of the annual leave due to him (60 days, amounting to 2,516.54 United States dollars).

D. Complainant appealed on 30 June 1967 against the decision notified to him on that date, which was confirmed by the Director-General on 5 July 1967. He then filed an appeal to the Appeals Board, seeking relief in the form of cancellation of the notice of termination or subsidiarily the award of damages in the sum of 54,525 United States dollars, that sum being the equivalent of his net salary for five years. On 14 December 1967 the Appeals Board recommended that the Director-General should reassign complainant between 1 January and 30 June 1968 to a post corresponding to his abilities and administrative experience in a grade equivalent to that of the post which had been abolished, and meanwhile that his services should be utilised in the secretariat as far as possible. Consequently the

Board refrained from ruling on the cancellation of the notice of termination and on the claim for damages. On 19 January 1968 the Director-General stated that he was prepared to give effect to the recommendations of the Appeals Board within the limits of the constitutional provisions and the terms of the Staff Regulations and Rules in force. Accordingly, he had complainant's name placed on the list of candidates for all vacant P.3 posts and informed all Assistant Directors-General and Directors that when recruiting temporary staff they should take complainant's candidature into account, with due regard to his abilities and experience. Up to the present time no post has been assigned to complainant.

E. In the meanwhile, on 13 February 1968, complainant filed the present complaint with the Tribunal, impugning the decision to terminate his appointment notified to him on 30 June 1967 and the decision taken by the Director-General on 19 January 1968 on the recommendation of the Appeals Board. He seeks relief in the form of the quashing of the decision of 30 June 1967, which was not cancelled by the decision of 19 January 1968, payment of arrears of salary up to the date of execution of the judgment; payment of an indemnity of 12,000 United States dollars for moral damage and prejudice to his professional reputation; assignment to a post at least equivalent to that which he previously held without loss of career prospects or financial benefits; subsidiarily, failing reinstatement, the award of an indemnity of 54,525 United States dollars in addition to the indemnities already paid to him; and finally, reimbursement of his costs.

F. The Organization prays the Tribunal that the complaint should be dismissed.

#### CONSIDERATIONS:

As to the exclusion of certain documents from the evidence

1. Complainant has produced a number of resolutions which show the reactions of the Organization's staff to the action taken in respect of him and of another staff member. The Organization asks the Tribunal to rule on the admissibility of these documents, alleging that their production is tantamount to intervention by the Staff Association, which has no access to the Tribunal. However, not only are the documents in question in no way improper; they are no more capable of influencing the Tribunal's decision than any of the other evidence submitted. They must be regarded as written evidence rather than as the statement of one of the parties or its representative. There is no cause to exclude them from the dossier.

As to the plea for violation of the right to be heard

2. Complainant complains that a medical certificate signed by the medical adviser of the Organization and a memorandum addressed on 17 March 1968 to the Senior Personnel Advisory Board were communicated to him by the Organization only during the procedure before the Appeals Board. It has not been established that either of these documents in any way influenced the decision to terminate complainant's appointment. The alleged delay in producing them did not therefore constitute a violation of his right to be heard.

As to the abolition of complainant's post:

3. The abolition of a post is not in itself a ground for complaint on the part of the holder of the post, that is, it cannot be resisted as such. However, if it is followed by the termination or downgrading of the staff member concerned, it may be of a nature to affect his interests. In particular, any illegalities by which it is tainted may invalidate the decision to terminate which it has entailed. In principle, therefore, complainant may legitimately challenge the reasons for the abolition of his post in so far as he is impugning the decision to terminate him to which it led. Nevertheless, as an organisational act the decision to deprive a staff member of his post lies within the Director-General's discretion and can be reviewed by the Tribunal only if it is in irregular form or tainted by procedural irregularity, or tainted by illegality or based on incorrect facts, or if essential facts have not been taken into consideration or conclusions which are clearly false have been drawn from the documents in the dossier. This is the case whenever such an act is taken for the sole purpose of removing a staff member for whose termination no other statutory reason can be found.

In the case at issue the evidence in the dossier shows that the abolition of complainant's post, while not aimed at complainant personally, formed part of the reorganisation measures taken in accordance with the decisions of the 14th Session of the Conference of the Organization. It is immaterial that the duties performed by complainant were maintained and assigned to other staff members, since the abolition of the post was motivated by objective reasons

which do not fall within the competence of the Tribunal.

As to the claim for termination:

4. Under Article 9.1 of the Staff Regulations the Director-General may terminate the appointment of a staff member if the necessities of the service require the abolition of his post. In such circumstances, Staff Rule 109.5(b) provides that "Staff members holding indeterminate appointments shall, as a general rule, be retained in preference to those holding other appointments, subject to the availability of suitable vacant posts in which their services could be effectively utilised". The latter of these texts in fact merely lays down the rules for the application of a general principle, namely that the Organization may not terminate a staff member with an indeterminate appointment whose post has been abolished without first having taken all appropriate steps to find him another post.

The obligations incumbent upon the Organization depend on the circumstances, and specifically, as stated in Article 109.5(b) of the Staff Rules, on the "efficiency, competence and integrity and length of service" of the person concerned. The Organization clearly cannot be expected to assign a staff member whose post has been abolished to a post for which he is not qualified, whatever the length of his service may be. Moreover, as a general rule, the procedure laid down by Articles 4.1 to 4.4 of the Staff Regulations and by Staff Rules 104.1 and 104.2 will be followed; in other words, after consulting the competent Advisory Board and comparing the merits of the various candidates, the Director-General will assign the staff member whose post has been abolished to another post only if he appears to be at least as competent as the other applicants in competition with him. However, it is consonant with the spirit of the rules and regulations that a staff member who has served the Organization in a fully satisfactory manner for a particularly long period, and who might reasonably have expected to finish his career in the same Organization, should be treated in a manner more appropriate to his situation. If he loses his post, he may claim to be appointed to any vacant post which he is capable of filling in a competent manner, whatever may be the qualifications of the other candidates. Not only does this interpretation of the relevant rules take account of the legitimate expectations of staff members, but it is not prejudicial to the Organization itself, which has every interest in employing staff members who have shown themselves deserving of confidence over a long period of employment.

5. In the case at issue, complainant entered the service of the Organization when he was 32 years of age and fulfilled the duties assigned to him in an exemplary manner over a period of 15 years. He is now approaching 50, and would find it all the more difficult to secure employment outside the Organization inasmuch as he has been engaged on specialised duties which have no counterpart in most national administrations or private organisations. He was therefore entitled to the treatment accorded to deserving former staff members, that is to say, he could claim appointment to any vacant post for which he was qualified, with priority over all other candidates.

The evidence produced does not establish that the Organization fulfilled all its obligations in the matter. It is true that on three separate occasions, on 2 December 1966, 17 April 1967 and 23 January 1968, the Personnel Office requested the competent bodies to take account of complainant's candidature in respect of any vacant posts. Nevertheless, on each of these occasions, instead of simply considering complainant's qualifications and appointing him to a post that he was capable of filling, the Organization assessed the merits of the various applicants and thus followed the normal procedure. In so doing it complied with the letter of the Regulations; but it did not take account of the general principle deduced above from Staff Rule 109.5.

The Organization cannot claim to have discharged its responsibilities by offering complainant a post in grade P.1/P.2 in the Sudan. Even if complainant had continued to receive his P.3 salary, the duties attached to the post were of a lower grade than those he had formerly performed. He was therefore justified in refusing the offer.

6. In conclusion, the Organization was not entitled to terminate complainant's appointment either on 30 June 1967 or subsequently. However, although the complaint is well-founded in principle, the Tribunal considers it expedient in the circumstances of the case to offer the Organisation the choice between the following alternatives:

- Either to decide finally not to reappoint complainant, and to pay him damages for the whole of the injury he has suffered including loss of pension rights, equal to five years' salary, or 54,525 United States dollars subject to deduction of the termination indemnity of 8,178.75 United States dollars already paid to him. In that event, complainant would retain the other sums paid to him.
- Or to rescind the decision to terminate complainant and to assign him to a new post within a maximum period of

six months, in accordance with the terms of Staff Rule 104.15(b). In that event complainant would be required to return the separation payment made to him, in accordance with the above-mentioned provision, but he would be entitled to payment of salary from 30 June 1967 up to the date of his reassignment.

#### DECISION:

For the above reasons,

1. The Organisation shall pay complainant damages amounting to 54,525 United States dollars, subject to deduction of 8,178.75 United States dollars, or a sum of 46,346.25 United States dollars, unless complainant is assigned to a new post within a maximum period of six months in accordance with the terms of Staff Rule 104.15(b), his salary being paid as from 30 June 1967 up to the date of his reassignment.
2. The other submissions in the complaint are dismissed.
3. The costs incurred by complainant in pursuing the present complaint, amount to 345 United States dollars, are awarded against the Organization.

In witness of this judgment, delivered in public sitting in Geneva on 17 March 1969 by M. Maxime Letourneur, President, M. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures, as well as myself, Bernard Spy, Registrar of the Tribunal.

(Signed)

M. Letourneur  
André Grisel  
Devlin  
Bernard Spy